Supreme Court, U.S.
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No. 02-

In the Supreme Court of the United States

CREDIT LYONNAIS ROUSE, LTD.,

Petitioner,

v.

OCEAN VIEW CAPITAL, INC., VIACOM, INC., AND EMERSON ELECTRIC CO.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Illinois Brick* v. *Illinois*, 431 U.S. 720 (1977), this Court held that the only proper plaintiffs in a price-fixing case under Section 4 of the Clayton Act are the "direct purchasers" who entered into transactions with the conspirators at artificially high prices. Then, in *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983), the Court further limited the class of persons who may sue for treble damages under the antitrust laws by holding that the plaintiff's injury must be the "direct" result of the defendant's anti-competitive conduct.

The plaintiffs here purchased physical copper. They sued the defendants under Section 4 of the Clayton Act, claiming that the defendants had manipulated the price of copper *futures* on the Comex division of the New York Mercantile Exchange. They claimed that, because they had entered into contracts that referenced Comex prices as one component of physical copper prices, the manipulation of Comex futures prices caused them to overpay for physical copper. None of the plaintiffs had purchased any goods or services from any of the defendants, and none had participated in the futures market in which the defendants allegedly had manipulated prices. The Seventh Circuit nevertheless held that they had antitrust standing.

1. Does *Illinois Brick*'s "direct purchaser" rule foreclose other theories of antitrust standing, such as "umbrella standing," which would grant standing to persons who purchased goods, at allegedly inflated prices, from collateral sellers unrelated to the price-fixing conspirators?

2. Is the chain of "direct causation" in price-fixing cases severed as a matter of law, when (a) the allegedly inflated prices paid by purchasers were the result of independent pricing decisions made by the purchasers in conjunction with sellers not part of the alleged conspiracy or (b) the purchases were made in a market separate from the market at which the conspiracy was directed?

RULES 29.6 AND 14.1 STATEMENT

Petitioner Credit Lyonnais Rouse, Ltd. ("CLR"), a defendant-appellee in the court of appeals, is a direct corporate subsidiary of Credit Lyonnais Capital Markets, PLC. Its ultimate parent is Credit Lyonnais, a publicly traded company. Credit Lyonnais owns more than 10 percent of CLR's stock.

The other defendants-appellees in the court of appeals were Global Metals and Minerals Corp.; Sumitomo Corp. of America; and Sumitomo Corp. CLR understands that they will be filing their own petitions for a writ of certiorari.

The respondents are Ocean View Capital, Inc., formerly known as Triangle Wire and Cable, Inc.; Viacom, Inc., as successor by merger to CBS Corp. (formerly known as Westinghouse Electric Corp.); and Emerson Electric Co. The respondents were plaintiffs-appellants in the court of appeals.

Additional parties in the court of appeals in cases consolidated with this one were the following: plaintiffs-appellants Loeb Industries, Inc., Los Angeles Scrap Iron & Metal Corp., and Metal Prep Co., Inc.; and defendant-appellee JPMorgan Chase & Co. (successor by merger to J.P. Morgan & Co., Inc. and Morgan Guaranty Trust Co. of New York).

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-50a) is reported at 306 F.3d 469. One of the relevant opinions of the district court (App., *infra*, 51a-83a) is reported at 153 F. Supp.2d 996; the other (App., *infra*, 84a-124a) is unreported.

JURISDICTION

The judgment of the court of appeals reversing the dismissal of the complaints was entered on September 20, 2002. The court denied a timely petition for rehearing on January 30, 2003. App. 130a-131a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides in relevant part:

> "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

INTRODUCTION

This case raises important questions about when a plaintiff that claims it paid an inflated price for goods as a result of anti-competitive activity may sue for treble damages under the Clayton Act. In *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), this Court held that "antitrust standing" is confined to the "direct purchasers" who purchased goods from the conspirators at artificially high prices. Then, in *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983) ("*AGC*"), the Court

held that traditional principles of proximate cause also circumscribe the category of permissible antitrust plaintiffs: there must be a "direct" connection between the plaintiff's injury and the defendant's anti-competitive behavior. The decision of the court below challenges both of these doctrines and creates a conflict among the circuits as to the scope of the *Illinois Brick* "direct purchaser" rule.

STATEMENT

A. The Parties, the Markets, and the Negotiated Prices.

1. Petitioner Credit Lyonnais Rouse, Ltd. ("CLR") is a clearing broker on regulated futures exchanges. A clearing broker executes transactions and trades at the direction of clients who wish to participate in the financial markets conducted by the exchange of which the broker is a member. The plaintiffs allege that in this capacity, CLR executed trades in copper futures for a Japanese trading company, Sumitomo Corporation, on the London Metals Exchange ("LME") between 1990 and 1996. The plaintiffs also claimed that the alleged manipulation of LME copper futures prices caused an artificial inflation in the price of copper futures on a separate exchange in the United States, the Comex division of the New York Mercantile Exchange ("Comex").

A "future" is a type of investment security that nominally gives one party the right to receive a commodity at a stated price at a certain date in the future while imposing on the other party (the counter-party) the obligation to deliver that commodity on those terms. Futures contracts are actively traded on exchanges not only by people who have the commodity or who will need it, but also by persons who believe that they can make a profit as prices fluctuate before the futures contract comes due. The factors that cause day-to-day and even intra-day swings in the price of exchange-traded futures contracts include projections of shifting demand for the commodity, changes in demand for such contracts, relative attractiveness of alternate investments, movement in interest

rates, changes in geopolitical conditions such as risks of war, and a myriad of other factors that affect financial markets.

2. The plaintiffs, Viacom Inc., Emerson Electric Corp., and Ocean View Capital Inc., (collectively, "the manufacturers") did not buy or sell copper futures. Instead, they purchased physical copper for use in the products they manufactured. They did not claim that CLR participated in the physical market by selling them copper. The manufacturers do not allege that CLR sold copper to them or any other parties. In purchasing physical copper, the manufacturers do not claim that they had dealings with CLR or with other alleged conspirators.

Rather, the manufacturers purchased the physical copper products (copper cathode, rod and wire) from domestic United States refiners who were not alleged to be part of any conspiracy to inflate the price of copper futures *or* physical copper. Viacom (as successor to Westinghouse Electric Corp.) purchased copper cathode, or sheets, from refiners. Emerson purchased copper wire, which is made from cathode. Ocean View, the third plaintiff, was farther down the production chain: it purchased copper that had already been transformed into rod.

3. In negotiating contracts for the purchase of physical copper, the manufacturers and their suppliers – independent third parties – chose to make the contract prices for their transactions turn on the varying prices for copper futures from time to time. The prices were not pegged precisely to the changing futures prices as of any certain date. Instead, their contracts referenced Comex copper futures prices for *one* component of the total price of the product. They used those prices as a benchmark from which the manufacturers and their suppliers negotiated varying positive and negative adjustments. Other components of the price included a variety of discretionary pricing options and formulae that were unrelated to futures prices; negotiated premiums that were based upon local supply and demand factors; and potential financial

discounts that were applied to the total price.

B. Suits by Market Participants.

In 1996, Sumitomo announced that one of its traders in Japan had been engaged in massive amounts of unauthorized trading in copper futures.[1] As a result of its role as one of Sumitomo's numerous clearing brokers, CLR has been named as a defendant in a number of antitrust suits, some of which have settled. The plaintiffs in several of those actions are persons who traded with or through alleged conspirators on the futures markets. In two additional California class actions, purchasers of physical copper products in the United States – including four companies that sold copper to the manufacturers who brought the case now before this Court – are asserting violations of state antitrust law based upon allegations similar to the claims alleged in this litigation.

Sumitomo, CLR and their co-defendants have already paid more than $150 million to settle claims brought by traders of copper futures – the persons who were direct purchasers in the market in which the alleged conspirators sold futures – and an additional $150 million to settle claims brought by purchasers of physical copper who sued under state antitrust law, which does not recognize the *Illinois Brick* direct-purchaser rule.

C. Federal Antitrust Claims by the Manufacturers.

Respondents Viacom, Emerson and Ocean View did not trade copper futures on any allegedly manipulated exchange. Nor did they purchase physical copper from any of the alleged

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[1] In 1998 the United States Commodities Futures Trading Commission entered into a "Settlement and Finding" with Sumitomo relating to the charge that it had violated the Commodities Exchange Act by artificially raising the price of copper futures. *In the Matter of Sumitomo Corp., Respondent*, CFTC Docket No. 98-14, Comm. Fut. L. Rep. P. 27, 327 (May 11, 1998). The CFTC has not accused CLR of knowingly participating in the alleged manipulation.

conspirators.[2] Nevertheless, they (along with several other plaintiffs whose claims are not at issue here) filed antitrust suits under Section 4 of the Clayton Act against Sumitomo, Global Metals, CLR and other financial intermediaries (Merrill Lynch and JP Morgan Co.). They alleged that CLR and the others "conspired" with Sumitomo to manipulate the prices of copper futures traded on the Comex and the LME. They claimed that the manipulation of prices on the Comex in turn inflated the price of *physical* copper, injuring everyone who – like the plaintiffs – purchased physical copper from *someone* during that time.

Their theory was that the alleged manipulation of futures prices had the effect of artificially increasing the prices they paid for physical copper. They had chosen to enter into contracts to purchase physical copper including a pricing term that referenced the prices being established in the futures market. Thus, they contended that they had standing to pursue treble damages claims against persons with whom they had never transacted business and who were participating in a separate market.

The Judicial Panel on Multidistrict Litigation consolidated the actions in the Western District of Wisconsin for pre-trial proceedings pursuant to 28 U.S.C. § 1407.

D. The Decisions Below.

1. Relying on two of this Court's antitrust decisions, the district court granted the defendants' motions for summary judgment, holding that the manufacturers lacked "antitrust standing." App. 81a, 120a. The court concluded that the manufacturers were not "direct purchasers," because they did

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[2] Defendants Sumitomo and Global Metals did sell physical copper, but their sales are not an issue in this case. Although one of the manufacturers, Ocean View, purchased a *de minimis* amount of copper from Sumitomo in 1992, those purchases do not form the basis of any of the plaintiffs' claims. App. 68a, 73a, 81a.

not deal with the defendants. Indeed, they did not trade in the copper futures market at all. Accordingly, the court ruled that *Illinois Brick* barred their claims. App. 75a, 80a, 104a, 115a-116a.

The district court further held that the rule enunciated in *AGC* presented an insuperable barrier to the manufacturers' claims, because "the individual decisions that go into physical market purchases are intervening factors that refute plaintiffs' assertion of a direct, causal connection between a manipulation of the futures market and an effect on a particular transaction" in the physical market. App. 70a, 119a.

2. The Seventh Circuit reversed. It accepted the manufacturers' argument that, because each of them had "based all of the purchases for which it seeks recovery *directly* on Comex" futures prices, its injuries were not "remote and indirect." App. 29a (emphasis added). The panel explained:

> "The contract price [each manufacturer] paid its suppliers for copper was directly and explicitly based on the Comex monthly settlement price, and therefore the defendants' manipulations directly and predictably had an impact on that price." App. 30a.

For this reason the court found that the manufacturers satisfied *AGC*'s "direct injury" requirement, even though it was the manufacturers and their untainted suppliers who chose to use Comex futures prices to affect the prices that they paid for physical copper.

3. The same emphasis on the alleged "causal" link between Comex futures prices and the contractual prices for physical copper dominated the court's analysis of the *Illinois Brick* direct purchaser rule. The Seventh Circuit viewed the "direct purchaser" rule of *Illinois Brick* as being too stringent. Accordingly, the court decided to enlarge the class of permissible antitrust plaintiffs to include the "**first purchasers**" of a product whose price was *affected* by an

antitrust conspiracy, even if the purchasers never dealt with the alleged conspirators and even if the conspirators were not participants in that separate, collaterally affected market.

Applying that new test, the court extended antitrust standing to the manufacturers, because they were the "first purchasers" of physical copper under the independent contracts that utilized Comex futures levels as a component of the price for buying physical copper from copper producers (that is, companies that smelt and refine copper from their own mines). It was deemed irrelevant that the defendants were not parties to those contracts. Also considered irrelevant was that counter-parties to the allegedly inflated copper futures contracts were in a position to press their own antitrust claims. The court declared that the manufacturers "are the only plaintiffs possibly situated to recover damages against the defendants for the anticompetitive harms they have inflicted on the physical market for copper cathode." App. 37a.

In extending antitrust standing to participants in a collateral market who engaged in transactions with parties not alleged to have been part of a price fixing conspiracy, the court adopted a rule that is functionally indistinguishable from "umbrella standing." That theory, urged by some antitrust commentators as an exception to *Illinois Brick,* has been squarely rejected by the Third and Ninth Circuits.

REASONS FOR GRANTING THE PETITION

Section 4 of the Clayton Act, 15 U.S.C. § 15, permits "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" to bring a suit for treble damages. This Court, however, has not interpreted the section as broadly as its language would suggest. Rather, it has "construed [the provision] in the light of its common-law background." *AGC*, 459 U.S. at 531. "Congress simply assumed that antitrust damages litigation would be subject to constraints comparable to well-accepted common law rules applied in comparable litigation" – that is, "doctrines such

as foreseeability and proximate cause, *directness of injury*, certainty of damages, and *privity of contract*." *Id.* at 532-33 (footnotes omitted) (emphasis added).

The Court's seminal decision in *Illinois Brick* is regarded as the most significant decision refining the class of permissible antitrust plaintiffs. It limits treble damage claims in price fixing and price manipulation cases to those persons who were the conspirators' "direct purchasers."

The Seventh Circuit's "first purchaser" doctrine greatly expands the concept of "antitrust standing" in price-fixing cases beyond the limits this Court has fashioned and reiterated. It also creates a conflict among the circuits as to the continued integrity of the "direct purchaser" rule. The manufacturers were not the "direct purchasers" of any goods or services from the defendants or any alleged co-conspirators. That fact alone should have rendered them ineligible to sue the defendants for treble damages under the Clayton Act as construed by this Court in *Illinois Brick*.

The court of appeals went even farther astray when it held that the manufacturers' injuries were sufficiently "direct" to satisfy *AGC*. Building on a questionable decision by another panel of the same court, the Seventh Circuit ruled that a would-be plaintiff can satisfy *AGC*'s "direct injury" requirement, even where (i) the plaintiff did not even participate in the same *market* in which the price-fixing allegedly took place; (ii) his alleged injuries arose as the result of independent pricing decisions that he made in conjunction with untainted suppliers, and (iii) *two* distinct classes of more directly affected purchasers could sue to recover the alleged overcharges – the defendants' counter-parties in the futures market, and the persons who purchased physical copper from some of CLR's co-defendants, Sumitomo and Global.

This Court should grant review in order to resolve the two significant questions that this case raises about the categories of purchasers who may sue to recover treble damages based upon

a claim that they paid artificially inflated prices for goods and services as a result of illegal price-fixing.

I. THIS COURT SHOULD RESOLVE THE CONFLICT IN THE CIRCUITS OVER THEORIES LIKE "UMBRELLA STANDING" THAT DISREGARD *ILLINOIS BRICK*'S DIRECT PURCHASER RULE.

1. In *Illinois Brick*, this Court circumscribed the class of persons who may sue for treble damages under Section 4 of the Clayton Act by claiming that an anti-competitive conspiracy to fix or manipulate prices has inflated the amount that they paid for goods or services. There the plaintiffs were purchasers of masonry buildings. They alleged that the defendants, manufacturers of concrete blocks, had engaged in illegal price-fixing. The inflated prices for the concrete blocks were passed through the masonry contractors who bought the blocks, and then through the general contractors who hired the masonry contractors, and eventually were passed along to the plaintiff building owners in the form of artificially high costs for the final buildings. The Court held that the plaintiffs did not have standing to sue for treble damages under the Clayton Act because they had not contracted with the concrete block manufacturers who had allegedly fixed prices. Thus, even though other parties involved in the directly affected market – or other, indirectly affected markets – could prove that they had been injured in fact by the anti-competitive activity, the Court ruled that the only permissible plaintiffs in such a case are the "direct purchasers" who dealt with the conspirators – that is, those persons who were in "privity of contract" with the defendants and paid inflated prices to them.

Three related but independent considerations provided the rationale for the *Illinois Brick* decision. First, this Court had previously rejected, as a matter of law, the notion that a defendant could prevail in an antitrust action by showing that a plaintiff that had paid the defendant an illegally inflated price had passed along the illegal overcharge to its own customers.

See *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968). Allowing a plaintiff to use such a pass-on theory offensively while precluding the defendant from using it as a defense would create a serious danger of duplicative recovery and ruinous damage awards, because each person in the chain of sale could-sue the defendant for treble damages. *Illinois Brick*, 431 U.S. at 728-29.

Second, the "direct purchaser" rule prevents antitrust litigation from becoming impossibly complex: "Permitting the use of pass-on theories under § 4 would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge from direct purchasers to middlemen to ultimate consumers. * * * [A]llowing indirect purchasers to recover using pass-on theories * * * would transform treble-damages actions into massive multiparty litigations involving many levels of distribution and including large classes of ultimate consumers remote from the defendant." *Id.* at 737, 740.

Third, the Court concluded that the direct purchaser rule would serve the "longstanding policy of encouraging vigorous private enforcement of the antitrust laws," because under that rule, "direct purchasers are not only spared the burden of litigating the intricacies of pass-on but also are permitted to recover the full amount of the overcharge." *Id.* at 745-46. Assuming that there is competition at their level of distribution, direct purchasers absorb some, and often most or all, of an overcharge. Thus, they are more likely to have a sufficient incentive to file suit than are indirect purchasers. *Id.* at 746-47.

2. The Court understood that its ruling foreclosed treble damage claims by categories of claimants who could make a plausible argument that they were actually injured: "It is true that, in elevating direct purchasers to a preferred position as private attorneys general," the direct purchaser rule "denies recovery to those indirect purchasers who may have been actually injured by antitrust violations." 431 U.S. at 746. In

practice, the imposition of the direct purchaser rule means that various categories of businesses or consumers who may sustain a loss "caused" by an antitrust conspiracy do not have a cognizable "antitrust injury" and thus are precluded from suing under Section 4. See, *e.g.*, *Blue Shield of Va.* v. *McCready*, 457 U.S. 465, 476-77 (1982) ("An antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable.") (citation and internal quotation marks omitted).

In *Illinois Brick* the Court anticipated that potential plaintiffs excluded by the direct purchaser rule would attempt "to carve out exceptions" to it. 431 U.S. at 744. However, it rejected that approach in favor of a clear and comprehensive bright-line "direct purchaser" rule. The Court repeatedly has reiterated the necessity of that bright-line rule. For example, in *Kansas* v. *Utilicorp United, Inc.*, 497 U.S. 199 (1990), the Court explained:

> "[A]mple justification exists for our stated decision not to 'carve out exceptions to the [direct purchaser] rule for particular types of markets.' * * * [T]he possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule. * * * In sum, even assuming that any economic assumptions underlying the *Illinois Brick* rule might be disproved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions." *Id.* at 216-17.

3. The Seventh Circuit nevertheless decided to fashion a new exception to *Illinois Brick*, one it called the "first purchaser" test. In doing so, it tried to take comfort, quite improperly, from cases in which this Court has held that *Illinois Brick* does not apply, particularly cases involving exclusionary conduct

rather than price fixing.[3]

The court allowed the copper manufacturers' suit to proceed because they were the "first purchasers" of bulk physical copper under contracts that were allegedly affected by the supposed manipulation of the futures market. The effect came about because the manufacturers and the *independent third parties* who agreed to supply them with copper had elected to use the prices being set from time to time in the separate futures market as an ingredient in their own contracts for the purchase of physical copper. The court cleverly crafted a term similar to *Illinois Brick*'s controlling concept of "direct purchaser" – "first purchaser" – to extend standing to "first purchasers" from unrelated sellers in a different market. No amount of sleight of hand can conceal the fact that this theory is simply the latest

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[3] The court of appeals generalized that "the Supreme Court has been willing to entertain suits between plaintiffs and defendants not in privity with each other" (App. 17a) The court looked to cases in which the plaintiff alleged that it paid inflated prices as a result of exclusionary market practices, not price-fixing. The persons who suffer "antitrust injury" in those cases are the illegally excluded competitors or other direct victims of the exclusionary conduct, so of course the "direct purchaser" rule that applies in price fixing cases like *Illinois Brick* does not apply. See, *e.g.*, *McCready*, 457 U.S. at 475; *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492 (1988); *National Collegiate Athletic Ass'n* v. *Board of Regents*, 468 U.S. 85 (1994); *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

As this Court explained in *McCready*, the *Illinois Brick* rule is simply inapplicable in cases alleging exclusionary activity as distinguished from price-fixing. The concerns underlying the direct purchaser rule are not implicated in cases where the injured party is either (i) the excluded merchant or (ii) the person bearing the costs associated with the exclusionary policy. *McCready*, 457 U.S. at 474-75. These cases present no danger of "duplicative" recovery, because there is no "direct purchaser" from the defendant who is entitled to sue. *Id.* at 474. Nor is litigation of such a claim unduly complex. *Id.* at 475 n.11.

effort to create a loophole in the antitrust doctrine this Court has carefully fashioned under *Illinois Brick*.

There was some relationship between the price of copper futures on a particular date and the price calculated under the manufacturers' contracts to purchase physical copper – the manufacturers and their suppliers voluntarily chose to create such a relationship. But the creation of that pricing relationship did not make the manufacturers "direct purchasers" under *Illinois Brick*. By making the semantic conversion of the "direct purchaser" rule into one that allows any "first purchaser" in some affected market to sue, the Seventh Circuit has fundamentally altered the legitimate scope of antitrust standing. The essential predicate of the "direct purchaser" rule is that, to have standing, a would-be plaintiff must have purchased directly *from one of the conspirators*. Extending antitrust standing to "first purchasers" from *anyone*, including independent sellers in a separate market, cannot be squared with *Illinois Brick*.

A simple analogy illustrates the flaw in the Seventh Circuit's new theory of antitrust standing. Many home mortgages throughout the country are pegged to the "prime rate" as it is published from time to time in the *Wall Street Journal*. The rate is determined by the average rate at which several money center banks lend to their major commercial customers. Like the copper contracts that the manufacturers entered into here, parties seeking mortgage loans from other banks negotiate for a mortgage rate somewhere above or below the published benchmark "prime rate."

If the money center banks conspired to fix the interest rate they charge to their customers, the artificially inflated prime rate would also have consequences for the millions of mortgage holders whose loans from their utterly innocent local banks are pegged to the prime rate. *Illinois Brick*, however, leaves no room to argue that these "first purchasers" of mortgage loans from their local banks would be viewed as "direct purchasers"

entitled to sue the money center banks with which they had never transacted business.

This result follows, even though the homeowners' increased mortgage payments would be just as "directly" traceable to the conspiracy to rig the prime rate as the manufacturers' copper contracts here were pegged to copper futures prices. The overcharged customers of the money center banks would be the proper – and only permissible – antitrust plaintiffs in this scenario, since they and they alone would be the "direct purchasers" from the conspirators.

4. Allowing this kind of suit by collateral purchasers poses precisely the problems that the direct purchaser rule was designed to prevent. It exposes defendants to potentially ruinous liability far beyond the bounds of any economic benefit they may have derived. As *Illinois Brick* recognizes, a regime that authorizes the direct purchaser, but *only* the direct purchaser, to sue for treble damages provides the appropriate amount of deterrence and financial liability without either excessive deterrence or excessive liability. See 431 U.S. at 730-31; *cf. Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 636-37 (1981) (in fashioning antitrust principles, courts "must consider the problem of 'overdeterrence,' *i.e.*, the possibility that severe antitrust penalties will chill wholly legitimate business agreements").

If Sumitomo, CLR and their alleged co-conspirators engaged in anti-competitive activity that caused the price of copper futures to rise artificially, the Seventh Circuit's "first purchaser" test would authorize treble damage claims by *anyone* who bought *any* copper cathode *anywhere* in the world from *any* copper producer during the six-year period of the alleged conspiracy. Trillions of pounds of physical copper were purchased during that period. That massive liability would have no reasonable relationship with the artificially inflated profits the conspirators allegedly reaped from their transactions with a limited class of counter-parties on the

futures exchanges.

Moreover, the damages of most of those "first purchasers" under the affected contracts would be duplicative of the claims of other plaintiffs in the physical market. As noted *supra*, several of the manufacturers' *suppliers* have already sued the defendants under state antitrust law to recover overcharges allegedly paid for $862 million worth of cathode and more than $1 billion worth of pre-cathode copper products. Many of those claims were based upon purchases of exactly the same copper cathode that was then resold to these manufacturers.

Under *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), an antitrust defendant is prohibited from defending against treble damage liability by arguing that the direct purchaser was able to "pass on" some or all of the overcharge to its customers. Indeed, *Illinois Brick* rests in part on this principle and concludes that it would create grossly unfair "duplicative" recovery to allow those customers to collect treble damages in addition to damages that direct purchasers may claim. 431 U.S. at 728-29.

The Seventh Circuit's "first purchaser" rule flouts this sound doctrine. It dramatically expands treble damage exposure to include remote purchasers who had no commercial dealings at all with the alleged conspirators. No company could survive that exposure. Driving businesses out of the market – and thus reducing competition – is antithetical to the antitrust laws, and should only take place if Congress has clearly indicated that it is warranted. *Cf. Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 264 (1972). This Congress has not done.

The Seventh Circuit's approach also engenders the type of highly complicated, speculative analysis that *Illinois Brick* and its progeny prohibit. If the opinion below is permitted to stand, on remand the district court will have to quantify the effects that fixing a price in one market may have had on transactions in a wholly separate, collateral market – an immensely detailed and complex inquiry.

Despite the Seventh Circuit's suggestion, there is no easily quantifiable relationship between Comex prices and cathode prices. First of all, there is no single, definitive Comex price that serves as a benchmark for all cathode contracts that are executed on a particular day. Rather, at any given time Comex quotes 24 different prices – one for delivery in the present month, and one for each month in the following two years. To complicate matters further, buyers and sellers do not limit themselves to using Comex settlement prices as reference points for their contracts; instead, they frequently use *intra-day* prices. Over the course of a single day, hundreds of prices can be quoted for contracts reaching maturity in each of the 24 possible delivery months.

In sum, purchasers of physical copper on any given day during the six-year period of the alleged conspiracy could have used, and did use, any of thousands of different prices to set the prices for their contracts. A further complication arises from the fact that the price of copper cathode in a particular purchase contract incorporated a variety of discounts from or premiums over the exchange price. In addition, contracts typically provided that, if the parties believe that futures prices did not fairly represent market rates, they may simply avoid using them as a benchmark.[4]

As a consequence, if the alleged anti-competitive activities of the defendants had any impact on the "real" market price for copper futures at any time on any day, the task of quantifying that impact would present substantial challenges. But it would require more than herculean effort to litigate the impact of those activities on each of those thousands of prices calculated under different purchase contracts for physical copper during the six-year period at issue.

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[4] Thus, this case does not involve the type of fixed-price, cost-plus arrangement that this Court contemplated *might* be an appropriate exception to the direct purchaser rule. *Illinois Brick*, 431 U.S. at 736, 750 n.4.

5. The Seventh Circuit's "first purchaser" rule is functionally identical to the doctrine of "umbrella standing," a largely discredited exception to the *Illinois Brick* direct purchaser rule. Umbrella standing allows persons who purchased goods from collateral sellers – sellers unrelated to the defendants and not involved in any conspiracy with them – to sue the defendants for any overcharge "caused" by the defendants' anti-competitive activities. The theory underlying this doctrine is that where "the conspiracy caused market prices to rise * * * [it] thereby * * * injure[d] consumers, *regardless of whether they purchased from the conspirators or from their innocent rivals*." II P. Areeda & H. Hovenkamp, ANTITRUST LAW ¶ 347, p. 384 (2d ed. 2000) (emphasis in original). Several federal district courts have adopted this doctrine.[5] However, it has been rejected by the Third and the Ninth Circuits.[6]

The Third Circuit has concluded that umbrella standing cannot be reconciled with *Illinois Brick*. In *Mid-West Paper Prods. Co.* v. *Continental Group, Inc.*, 596 F.2d 573, 580 (3d Cir. 1979), one of the plaintiffs sought to sidestep *Illinois Brick*, claiming it could "sue for treble damages because of injuries it suffered as a direct purchaser of consumer bags *from competitors of the defendants*, who allegedly were able to charge artificially inflated prices as a consequence of

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[5] See, *e.g.*, *In re Uranium Antitrust Litig.*, 552 F. Supp. 518, 525 (N.D. Ill. 1982); *Pollock* v. *Citrus Associates of New York*, 512 F. Supp. 71 (S.D.N.Y. 1981); *In re Bristol Bay, Alaska, Salmon Fishery Antitrust Litig.*, 530 F. Supp. 36 (W.D. Wash. 1981).

[6] The Fifth Circuit embraced umbrella standing in a footnote in *In re Beef Industry Antitrust Litig.*, 600 F.2d 1148, 1166 n.24 (5th Cir. 1979), stating that a plaintiff alleging that it overpaid for goods due to "price following" by the conspirators' competitors "satisfies the test for proximate causation." However, *Beef Industry* relied on a "target area" test for proximate causation that this Court later rejected in *AGC*. See 459 U.S. at 537 n.33.

defendants' price-fixing." *Id.* at 580 (emphasis added). The court explicitly rejected this theory, explaining that it would thwart the policy objectives of *Illinois Brick*:

> "Apart from its speculative nature, any attempt to determine the effect of defendants' overcharges upon their competitors' prices would transform this antitrust litigation into the sort of complex economic proceeding that the *Illinois Brick* Court was desirous of avoiding if at all possible. * * * *Illinois Brick* represents in effect the proposition that when defendants have fixed prices above the competitive market price, where the benefit derived by them is readily ascertainable, the objectives of the treble damage action are fulfilled when the defendants are required to pay the direct purchasers three times the overcharge. * * * [T]here appears to be little reason to expand the standing doctrine in a manner that would require complex and ultimately unrewarding economic analyses at trial, particularly where, as here, such analyses invariably are a prerequisite to establishing that a plaintiff has suffered compensable injury altogether." *Id.* at 585.

The Ninth Circuit followed suit, dismissing a *parens patriae* action brought by a number of States that alleged that a group of oil companies had conspired to raise or stabilize the prices of refined petroleum products. *In re Petroleum Prods. Antitrust Litig.*, 691 F.2d 1335 (9th Cir. 1982). Although approximately 80 percent of the transactions at issue involved purchases from retail dealers who had no connection with the alleged conspirators, the plaintiffs sought to collect damages for those transactions as well. They claimed that the high prices charged by the conspiring oil companies had

> "created a 'price umbrella' under which non-conspiring competitors of the defendants raised their gasoline prices to an artificial level at or near the fixed price. Since defendants are allegedly responsible for creating a market situation where conduct of this nature is possible, plaintiffs

argue that defendants should be held responsible for damages resulting from their competitors' higher prices." *Id.* at 1338-39.

The Ninth Circuit held that *Illinois Brick* barred using an "umbrella standing" theory to sustain claims arising from transactions in which the plaintiffs were not purchasing directly from the defendants. First, the court was concerned about the danger of duplicative recovery. *Id.* at 1340. Second, allowing umbrella standing would impermissibly complicate antitrust litigation, because this theory would require the courts not only to explore the legitimacy of the pricing decisions the alleged co-conspirators made, but also would "sanction complex judicial inquiry into the pricing decisions of sellers remote from plaintiffs." *Id.* at 1341.

Both *Mid-West Paper* and *Petroleum Products* conflict with the decision below. Although the court of appeals protested that it was merely leaving the umbrella standing question "open for further exploration at the district court level," App. 20a-21a fn, its decision can only be understood as accepting the theory. The court held that a plaintiff that purchased copper from third parties unaffiliated with the alleged conspirators may recover from the alleged conspirators, simply because the conspiracy had a collateral impact on the prices that the manufacturers paid in "innocent" transactions. That analysis is indistinguishable from the umbrella standing doctrine, which (as the Ninth Circuit put it) "is essentially a consequential damages theory. It seeks to hold price-fixers liable for harm allegedly flowing from the illegal conduct *even though the price-fixing defendants received none of the illegal gains and were uninvolved in their competitors' pricing decisions*." *Petroleum Products*, 691 F.2d at 1339 (emphasis added).

Here, CLR and its co-defendants, like the defendants in *Mid-West Paper* and *Petroleum Products*, did not deal with the manufacturers, reaped no gains from the manufacturers' alleged overpayments, and were entirely uninvolved in the pricing

decisions made jointly by the manufacturers and their suppliers. Moreover, as discussed *supra* (at pp. 14-16), the concerns about duplicative recovery and overly complicated damages calculations that underlay those decisions – as well as *Illinois Brick* – are even more acute here. This Court should grant review in order to resolve this conflict among the circuits.

II. THIS COURT SHOULD DETERMINE WHETHER, AS A MATTER OF LAW, A PLAINTIFF LACKS ANTITRUST STANDING WHERE ITS INJURY ARISES FROM INDEPENDENT PRICING DECISIONS MADE BY PERSONS OTHER THAN THE ALLEGED CONSPIRATORS.

1. This case raises an additional and separate question of general importance in administering the antitrust laws: whether, under *Associated General Contractors*, the chain of "direct causation" is severed (i) when the alleged injury consists of an allegedly inflated price, but the price was freely negotiated between the plaintiff and independent third-party; or (ii) when the impact of the alleged conspiracy is felt in a market different from the one at which the conspiracy was directed.

The Court's decision in *AGC* requires that, to give rise to a treble damage claim under Section 4 of the Clayton Act, the antitrust conspiracy must be the "direct" cause of the financial injury about which the plaintiff is complaining and there must be some direct connection between the defendant's conduct and the plaintiff. The court below, however, established its own test for satisfying *AGC*'s requirement of "direct causation," ruling that a plaintiff satisfies the requirement whenever he shows some discernible correlation between the defendants' conduct and the price paid.

Properly understood, though, there is no "direct causation" under *AGC* when the claimant is alleging injuries suffered in one market (here, the physical copper market) and the alleged anti-competitive behavior by the defendants took place in a wholly different market (the copper futures market). Nor is there "direct causation" when the only link between the price

paid by the claimant and the defendants' conduct is the voluntary decision by the claimant, in negotiation with an untainted supplier, to tie the price for their transaction to the price of the allegedly manipulated item.

2. In *AGC*, this Court refused to allow a labor union to maintain a treble damage action against employers who allegedly conspired to coerce third parties to use non-union contractors. The injury to the union and its members was real and foreseeable; indeed, it was "buttressed by an allegation of intent to harm the Union." 459 U.S. at 545. Nonetheless, the Court held that, as a matter of law, the union's injuries were not sufficiently "direct" to permit it to sue for treble damages; the union was "neither a consumer nor a competitor in the market in which trade was restrained." *Id.* at 539. The Court established five factors that should be considered in determining whether a plaintiff's injury is a sufficiently "direct" result of anti-competitive conduct to support antitrust standing: (i) the causal connection between the anti-competitive activity and the harm suffered by the plaintiff; (ii) the nature of the plaintiff's injury and whether the antitrust law was designed to provide redress for it; (iii) the "directness or indirectness of the asserted injury"; (iv) the existence of more direct victims who could assert claims against the conspirators; and (v) the risk of duplicative recovery or complicated apportionment of damages. 459 U.S. at 537-46.

All of these factors militate against allowing a suit to proceed where the plaintiff's claim arises from an independent pricing decision in a market other than that in which the alleged price-fixing took place. As discussed in Point I *supra*, in such a situation, ascertaining the nature and extent of any harm will be speculative, because it will be necessary to evaluate the connection between pricing in the two markets. There will generally be a risk of duplicative recovery. The apportionment of damages will be highly complex. Most significantly, however, the plaintiff's injury will generally be insufficiently direct as a matter of law, and there will always be more direct

victims with claims against the wrongdoers.

Here, for example, the alleged conspiracy focused on inflating the price of copper futures on two regulated exchanges. As in *AGC*, the manufacturers were "neither consumers nor competitors" in that market; they purchased physical copper in an entirely separate market. The manufacturers and their commercial sellers chose to enter into contracts that utilized the fluctuating prices of copper futures as *one component* of the price they agreed to set for their transactions in physical copper; they then made a second set of decisions about what role that component should play in setting the final price.

The manufacturers have never contended that pricing decisions in the physical copper market were an automatic, invariable, predicate function of Comex prices. Rather, as discussed at p. 16 *supra*, participants in the market for physical copper selected a mechanism to identify one of many possible futures prices to be used as a threshold benchmark. This involved agreeing on the particular exchange that would be used, the date or period that would be relevant, and the kind of price that would be used (*e.g.*, closing price, average intra-day price). Once they had agreed on a chosen benchmark, they negotiated adjustments to the benchmark, agreeing whether to price their transaction at, above, or below that benchmark price by some negotiated amount.

The manufacturers conceded that the negotiated premium or discount fluctuated according to changes in supply and demand in the physical market. In addition, some of the contracts provided an option to avoid using the Comex copper futures prices as a base price, if the manufacturers believed that it did not reflect market conditions.

Under *AGC,* any manipulation of the futures market price cannot be regarded as the "direct cause" of any price inflation in the physical market, even if the effect was foreseeable. The antitrust laws protected the integrity of the futures market and

the interests of participants in that market against manipulation of that market. Collateral consequences for other persons involved in other transactions in other markets cannot be viewed as the "direct" result of antitrust violations in the futures market.

Moreover, the intervening pricing decisions by the participants in the physical market, including sellers who were not tainted by any role in the alleged conspiracy, necessarily severed the chain of causation. The manufacturers and their suppliers could simply have picked a dollar amount at which to trade copper, or used any other imaginable benchmark. Had they done so, the alleged manipulation of the copper futures market could not and would not have made a jot of difference to the price that the manufacturers paid for copper. The causal connection between the alleged anti-competitive conduct and the claimed injury cannot fairly be described as sufficiently "direct" within the meaning of *AGC*, when the manufacturers and other third parties made independent judgments about (i) whether to select futures prices as a benchmark and (ii) what to do with that benchmark.

Independent commercial decisions to use futures prices as an ingredient in pricing other transactions necessarily broke the chain of direct causation. As in *AGC*, the manufacturers are complaining of purely "consequential harm resulting from a violation of the antitrust laws." 459 U.S. at 545.

3. It is also significant that in cases where the would-be plaintiff did not participate in the market in which the defendants fixed prices, there will *necessarily* be "more direct victims of the alleged conspiracy," a circumstance that this Court found to "weigh heavily against judicial enforcement of the Union's antitrust claim" in *AGC*. 459 U.S. at 545. "The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party * * * to perform the office of a

private attorney general." *Id.* at 542.

Here, for example, the "more direct victims of the alleged conspiracy" are the defendants' counter-parties on the futures market. These "direct victims" can sue – and have sued – to assert their claims, rendering the manufacturers superfluous as private attorneys general.

4. No actor in the market for physical copper has standing under Section 4 to sue the defendants for allegedly manipulating *the copper futures market.* As the court below noted, the manufacturers have not alleged a conspiracy to fix or inflate prices *in the physical market*, a market in which CLR, for example, as a clearing broker on the futures exchanges, did not participate.[7]

Even if the manufacturers were to assert that they were injured by a conspiracy to manipulate the price of physical copper, their claims would still be barred, because there were "more direct victims" within the physical copper market. Various purchasers acquired approximately 3 billion metric tons of physical copper from Sumitomo during the period of the alleged conspiracy. Those persons were undoubtedly injured more "directly" than were the manufacturers, who did not deal

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[7] The court observed: "It is true that Sumitomo Corporation made some sales of cathode, primarily overseas, to reap the benefit of its illegal futures market scheme. None of the plaintiffs, however, is seeking recovery on the basis of any of these cash market sales; ***all rest solely on the manipulation of sales of futures contracts.***" App. 18a (emphasis added).

Although the manufacturers have claimed that Sumitomo and its alleged conspirators *intended* by their manipulations to inflate the price of physical copper to supra-competitive levels, the "availability of the § 4 remedy to some person who claims its benefit is not a question of the specific intent of the conspirators." *McCready*, 457 U.S. at 479. See also *AGC*, 459 U.S. at 537 n.37 (the "allegation of intent to harm the Union" was insufficient to confer antitrust standing on it).

with *any* of the defendants.

The court below made the remarkable and inaccurate assertion that the defendants were arguing that "nobody" was a "proper plaintiff in the physical market." App. 21a. To the contrary, defendants have always recognized that, if there were a conspiracy to inflate prices in the physical copper market, any "direct purchaser" of physical copper from any co-conspirator would be a "proper plaintiff."

5. In concluding that the link between the allegations of anti-competitive behavior and the manufacturers' injuries were sufficiently "direct," the court below relied heavily on one of its prior decisions, *Sanner* v. *Board of Trade*, 62 F.3d 918 (7th Cir. 1995). That case, however, simply illustrates that the Seventh Circuit has adopted an approach to antitrust standing that cannot be reconciled with this Court's requirements and must be corrected.

The plaintiffs in that case were soybean farmers who alleged that the Chicago Board of Trade and others had conspired to depress the price of soybean futures on the exchange in order to benefit traders who held short positions in soybeans and had failed to hedge against their purchasing needs. The district court dismissed the farmers' claims for lack of antitrust standing, but the Seventh Circuit reversed. Assuming as true the complaint's allegations that "one market tends to move in lockstep with the other," the court concluded that the "futures market and the cash market for soybeans are thus 'so closely related' that the distinction between them is of no consequence to antitrust standing analysis." *Id.* at 929.

Sanner differed from this case, because it was alleged that the price of soybean futures *established* the market price for soybeans. Here, by contrast, there were two distinct markets with separate pricing mechanisms. The connection between the two was created by individual agreements between the manufacturers and their copper suppliers in which they chose to use futures prices, with various adjustments, as the contract

price for transactions in physical copper.[8]

More significantly, *Sanner* itself is of questionable validity in light of *Illinois Brick* and *AGC*. The *Sanner* court granted standing to *anyone* who had sold soybeans at the depressed prices caused by the defendants' manipulation of the futures exchange, even though the farmers were not themselves parties to the manipulated futures contracts. The fact that the Seventh Circuit has now expanded antitrust standing beyond the limitations imposed by *Illinois Brick* and *AGC* in *two* cases makes it even clearer that review by this Court is necessary to restore the principles established by those cases.

III. THE CONFLICT OVER THE SCOPE OF PRIVATE ANTITRUST ENFORCEMENT HAS SERIOUS PRACTICAL CONSEQUENCES.

The Seventh Circuit's overly broad conception of antitrust standing threatens to over-deter potentially legitimate conduct and, if left unchecked, can destroy firms and entire industries by permitting the imposition of duplicative and ruinous damages.

A uniform rule is necessary because it is easy for antitrust plaintiffs to shop for a hospitable forum. The Clayton Act expressly authorizes nationwide service or process and allows claimants to sue wherever a defendant is "found." 15 U.S.C. § 22. This case provides an excellent example of the outcome-determining impact of forum shopping. Ocean View originally sued CLR and the other defendants in the Southern District of

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[8] Thus, Judge Cudahy, who wrote *Sanner* and was on the panel below, split from the majority on this point: "Based on the complaint [in *Sanner*], there could be no question that a given manipulation in the futures marekt produced a precisely proportionate consequence in the cash market. That is hardly the case with Comex and the market for physical copper. * * * The case before us, although it seeks to apply *Sanner*'s principle, may be a major step beyond *Sanner*." App. 49a.

New York, where the Comex futures market is located and where the defendants have relevant, major offices to carry on their business. Subsequently, Viacom and Emerson – more savvy plaintiffs – sued in the District of Wisconsin, which has no significant connection with the alleged conspiracy, in order to avail themselves of *Sanner* and other favorable Seventh Circuit precedent.

The Multidistrict Litigation Panel consolidated the cases and selected Wisconsin as the appropriate forum. App. 125a-126a. Two days after the M.D.L. panel made its venue decision, but before the transfer order was received and filed, the judge presiding over the Ocean View case in Southern District of New York issued an opinion dismissing the suit, finding that Ocean View lacked antitrust standing. The court explained: "The antitrust laws are not designed to provide a remedy for those, such as [Ocean View], whose harm is related indirectly to anti-competitive behavior and whose damages are too speculative." *Ocean View Capital, Inc.* v. *Sumitomo Corp. of America*, 1999 WL 1201701, at *8 (S.D.N.Y. Dec. 15, 1999). The M.D.L. panel ruled, however, that the Southern District's opinion had no force because its transfer decision had already wrested jurisdiction away from that court. App. 128a-129a.

The decision to bring the other complaints within the Seventh Circuit proved felicitous for the manufacturers, when the court of appeals, applying and extending *Sanner*, reinstated the claims that even the district judge in Wisconsin had tossed out under *Illinois Brick* and *AGC*. Thus, the manufacturers successfully manipulated the venue rules in order to take advantage of a forum that would be hospitable to their claims. This concrete dichotomy between the Seventh Circuit's approach to antitrust standing and the rules recognized elsewhere demonstrates that the Seventh Circuit's expansive and punitive interpretation of antitrust standing will have pernicious effects throughout the national financial markets.

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The essential holding of both *Illinois Brick* and *AGC* is that indirect, remote, collateral and secondary injuries – even if real, and even if "caused" in a sense by the antitrust conspiracy – simply are not actionable under Section 4. Where the defendants allegedly conspired to fix prices in a particular market, *AGC* limits the universe of persons who are proper antitrust plaintiffs to participants *in that market*. *Illinois Brick* further limits the universe of proper plaintiffs to persons who dealt directly with the defendants in that market. This Court should clarify both of those points.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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